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Before The
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

OCT 25 1996

Federal Communications Commission
Office of Secretary

In re Applications of) MM Docket No. 93-75
)
TRINITY BROADCASTING OF)
FLORIDA, INC.) BRCT-911001LY
)
For Renewal of License of)
Television Station WHFT(TV))
Miami, Florida)
)
GLENDALE BROADCASTING)
COMPANY) BPCT-911227KE
)
For Construction Permit for)
New Television Station in)
Miami, Florida)

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To: The Commission

OPPOSITION OF GLENDALE BROADCASTING COMPANY
TO MOTION TO VACATE RECORD, ETC.

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October 25, 1996

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To: The Commission

OPPOSITION OF GLENDALE BROADCASTING COMPANY
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1. The Motion to Vacate the Record on Improvidently Designated Issues filed August 20, 1996 is without merit and should be denied.

I.
Summary

2. In 1991 and again in 1992, Trinity argued that it was above the de facto control laws under minority preference programs of which it took advantage. The full Commission rejected that argument in the hearing designation order in 1993. At the hearing, Trinity offered evidence purportedly in support of the argument, which it carried forward once again in proposed findings and conclusions addressed to the Presiding Officer. Judge Chachkin rejected the argument based on a record that is devastating to Trinity both in terms of its total and indefensible dominance of the so-called minority ventures and the

lack of candor of Trinity and Mr. Crouch in dealing with the Commission and testifying at the hearing. Trinity once again repeated the argument in its exceptions from Judge Chachkin's decision that, with the demise of the Review Board, are currently pending before the full Commission.

3. Trinity has now filed a prolix, repetitive pleading asking the Commission to cancel its hearing designation order and abruptly abort the entire proceeding. Who is Trinity kidding? This is its fifth brief filed with the agency setting forth Trinity's views that the de facto control laws do not apply to it. Those views have been rejected by the full Commission at the predesignation stage and now by Judge Chachkin following an evidentiary hearing. The instant motion raises nothing new of any substance, just more rhetoric. A lot more. The motion is as long as it is because Trinity keeps saying the same things over and over.

4. The motion purportedly relies on two items of "new evidence." One is 11 years old, i.e., a dissenting opinion by Commissioner Patrick in 1985, which has previously been argued before Judge Chachkin and is again argued in Trinity's brief pending before the full Commission. The other is nine years old, i.e., dialogue with staff persons regarding the filing of a Trinity application in 1987, concerning which testimony was given at the hearing, argument was made before Judge Chachkin and argument is also currently pending before the full Commission on exceptions to his decision.

5. The embellishments which Trinity now attempts to put on these events in 1985 and 1987 could and should have been raised at the hearing, which was held many years later in 1993 and 1994, if they added anything of substance to Trinity's cause. Which they don't. Trinity's effort to build them into something important is in error, violates FCC rules and is disingenuous.

6. The motion is an unsanctioned outlaw pleading that is an eleventh-hour desperate attempt to deflect the Commission from a clear-cut decision on Trinity's flagrant disregard of Section 310 of the Communications Act of 1934 as enacted by the Congress and consistently interpreted by the courts and the agency in decisions dating back to the very beginnings of the Commission itself. The Commission should deny the motion and proceed to a final decision.

II. Introduction

7. Based on the preponderance of the evidence, and much more, Judge Chachkin, a veteran of many years on the bench with previous service both as FCC trial counsel and as communications counsel in private practice, has arrived at the following determinations:

8. It is beyond question that Trinity has exercised de facto control over NMTV.¹ This determination is based on the overwhelming evidence of record which establishes that at all

¹ Except where the context requires otherwise, "Trinity" refers to Trinity Broadcasting Network and "NMTV" refers to National Minority TV, Inc., formerly Translator TV, Inc.

relevant times, NMTV has marched in absolute lockstep with Trinity. Trinity has controlled NMTV insofar as NMTV's purpose, corporate composition, programming, personnel and finances are concerned. Furthermore, and equally significant, Trinity has held out to the public that NMTV is a mere operating division of Trinity with no plans or incentive to break away. Initial Decision, released November 6, 1995 ("ID") at ¶304.

9. On September 9, 1980, the Commission adopted a Notice of Proposed Rulemaking in BC Docket 78-253 which, among other things, proposed giving a preference to low power television and translator applicants with 50% or greater minority ownership and control. Two days later, in anticipation of the proposed changes, Trinity founder Paul Crouch conceived of a way to take advantage of the Commission's proposal to award a minority preference. NMTV was created. NMTV, claiming a minority preference, would apply for construction permits for new television translators to rebroadcast Trinity programming and for low power television stations, while Trinity would acquire unbuilt and existing stations. That policy directive changed when the Commission in 1985 created the minority-controlled exception to its multiple-ownership rules, permitting Trinity to use NMTV to acquire a 13th and 14th full power TV station. Like Trinity, NMTV was organized as a nonprofit, non-stock California corporation. NMTV's Articles reflect religious purposes which, in Crouch's view, are very similar to that of Trinity; namely, to preach the gospel. The Articles do not provide that the

corporation was to be minority owned or controlled and the issue of minority control was not discussed with Trinity's FCC counsel. NMTV was incorporated on September 16, 1980, seven days after the FCC rulemaking notice. ID at ¶305.

10. Thus, from its inception and throughout the existence of NMTV, Crouch always intended for NMTV to be nothing more than another vehicle to carry out Trinity's mission of spreading the gospel over the airways. Indeed, NMTV's governing documents reflect a singular goal which all but mimics that of Trinity. Crouch's claim that he intended to create a company which would be owned and controlled by minorities is belied by the fact that the company's governing documents make absolutely no reference to forming a company that would be owned, controlled, or operated by minorities. Further, although Crouch claims to have intended for NMTV to some day become independent of Trinity, the record makes clear that NMTV was conceived as and remains a subsidiary of Trinity, totally dependent on Trinity for money, supervision, and overall direction. In fact, to this very day, NMTV has never developed, much less implemented, any plan to "break away" from its parent company, Trinity. ID at ¶306.

11. The corporate composition of NMTV provides, perhaps, the best evidence of Crouch's and Trinity's intent in creating NMTV. At its inception and through the hearing Crouch served as president and one of the three directors of NMTV. Crouch installed Jane Duff, who is Black and a director of Trinity as director and vice president of NMTV. Duff has served in those

capacities throughout the history of NMTV. Duff has also served as "Assistant to the President" of Trinity, (Crouch), since 1981, the second highest management position in Trinity's hierarchy. Among her many responsibilities, she is responsible for Trinity's translator and LPTV applications. Also, when NMTV secured full power TV stations, she was put in charge of those operations. Duff's prominent position in Trinity's operations and her many varied and important responsibilities with Trinity was not disclosed in the LPTV and TV applications filed by NMTV and was first revealed involuntarily in 1991. Duff has received no remuneration from NMTV; her income comes solely from her services for Trinity. ID at ¶307.

12. With respect to the other members of NMTV's board of directors, the record reflects that their selections by Crouch were based on two criteria: (a) minority status and (b) demonstrated past loyalty to Trinity. Further, each of the four "outside" directors evidenced a woeful lack of involvement in and knowledge of the affairs of NMTV. Thus, they failed to qualify as "owners" in any meaningful sense. Even if they had opted to be more active participants, the governance of NMTV would not have changed. In initially naming himself and fellow Trinity director Duff to NMTV's board and in limiting the number of directors who actually served,² Crouch ensured that he would

² It is noteworthy that NMTV's bylaws always permitted up to ten directors to serve on its governing board. Notwithstanding, the number never exceeded four and during most of NMTV's existence, did not go beyond three.

retain iron clad control over the affairs of NMTV. Hence, it was unnecessary for NMTV's governing documents to contain the same "protections" against Crouch's removal as did Trinity's bylaws. ID at ¶308.

13. Crouch and Trinity's complete domination of NMTV permeates every facet of NMTV's affairs. From NMTV's inception, Trinity has controlled that company's finances in all material respects. After NMTV was formed, Trinity's paid employees, consultants and lawyers prepared the company's LPTV applications. NMTV was never billed for any services connected with those applications. During the initial years of its existence, NMTV did not maintain a bank account at any financial institution. Rather, the company's finances were maintained by Trinity personnel in a Trinity account. The financial condition of NMTV was reflected each year in a Trinity financial report which was prepared by accounting firms retained and paid by Trinity. NMTV was never billed for any of these services. ID at ¶309.

14. During the initial years of NMTV's existence, Trinity conducted telethons during which contributions were solicited from viewers for NMTV and its projects. Trinity employees processed the money and pledges that were received as a result of the telethons, and Trinity's accounting personnel determined whether and to what extent NMTV's account should be credited with any of the money received. ID at ¶310.

15. For a number of years, Trinity accounting personnel debited NMTV's account for expenses incurred by Trinity in

connection with Trinity's efforts to obtain translator and LPTV stations. Since NMTV was created for the purpose of obtaining such facilities, the inference that must be drawn is that Trinity charged its translator/LPTV-related expenses to the NMTV account because Trinity considered NMTV to be a mere subordinate vehicle for carrying out Trinity's translator/LPTV activities. This practice caused NMTV's account to reflect an ever increasing negative fund balance which, by 1987, ballooned to more than \$480,000. No one - not Crouch, Duff, or the company's CFO, Espinoza - ever questioned the Trinity practice of attributing its translator/LPTV debts to NMTV despite the fact that during much of that time NMTV was virtually inactive. ID at ¶311.

16. When NMTV acquired its first full power television station in Odessa, Texas in 1987, it did so with money from Trinity. As it had done with its other owned and operated companies, Trinity provided the money to NMTV without any security, repayment terms, interest, or promissory note. This was consistent with Trinity's modus operandi for companies whose governing boards - and finances - are controlled by Crouch and other Trinity personnel. By contrast, companies with autonomous governing boards, whose stations are Trinity program affiliates in the traditional sense, have received loans from Trinity that are evidenced by formal written notes which contain all pertinent terms and conditions. ID at ¶312.

17. Trinity's informal method of dispensing money for NMTV projects continued unabated through 1992. Thus, without any

evidence of notes, security, terms, or interest rates, Trinity funded the entire construction of NMTV's Odessa full power television station, the purchase and complete construction of NMTV's Portland full power television station, and the filing of numerous LPTV construction permit applications. Furthermore, Trinity agreed to fund in the same informal manner NMTV's proposals to purchase additional full power commercial television stations in Wilmington, Delaware (\$3.6 million); Concord, California (\$5.4 million); and Hammond, Indiana (\$9 million). ID at ¶313.

18. The financial control that Trinity exercised over NMTV is best illustrated by the events transpiring after the Odessa station was sold to Prime Time, a religious entity which promised to continue airing Trinity programming. In fact, neither Crouch, Duff, nor Espinoza, the "outside" director, considered selling the station to anyone who would not continue to operate it as a Trinity affiliate. Clearly, the continuation of Trinity programming - not return on investment - was the main concern in finding a suitable buyer. No one associated with NMTV made any effort to determine the fair market value of the Odessa station before it was sold. In fact, although NMTV was heavily in debt, it agreed to sell the Odessa station to Prime Time for more than \$100,000 below what it cost to construct the facility. ID at ¶314.

19. The sale of the Odessa station to Prime Time was not a cash deal. Rather, NMTV took back a note for the entire \$650,000

sales price. When Prime Time subsequently expressed concern that it might go bankrupt if it was not relieved of its debt, NMTV simply wrote off the entire obligation. There was little, if any, consideration given to modifying the terms of the note in order to make it easier for Prime Time to continue making payments. Of course, the real motivation for cancelling Prime Time's debt was the concern that if Prime Time went bankrupt, Trinity might lose an affiliate station in Odessa as well as other Trinity affiliate stations that Prime Time owned. ID at ¶315.

20. Clearly money was not a concern for NMTV because it had from Trinity what in essence was a bottomless reserve of available funds for projects that furthered Trinity's goals. Every existing full power television station that NMTV acquired or considered acquiring, and every application for a construction permit for a new LPTV or translator station that NMTV filed with the Commission was in a market that did not yet enjoy over-the-air reception of Trinity programming. When it was not in Trinity's interest to construct a studio in Odessa capable of originating local programming, the studio was not built. By contrast, when it benefitted Trinity to have such a studio at NMTV's Portland, Oregon, station, or to commence construction of a new NMTV LPTV or translator station, the money and personnel that were needed became immediately available. ID at ¶316.

21. The evidence also reveals that throughout NMTV's existence, Trinity personnel have performed work at all levels

for NMTV without compensation and, in numerous instances, as part of their Trinity duties. Crouch receives a salary from Trinity and has always served simultaneously as an officer and director of both Trinity and NMTV. Similarly, Duff has always been a salaried employee of Trinity and for a number of years was also an officer and director of Trinity while serving as an officer and director of NMTV. The address for NMTV's main offices has always been the same as the address of Trinity's headquarters. However, NMTV has never occupied its own offices within the Trinity complex. For example, Duff's office at Trinity has always served as her office for NMTV. Duff routinely performed numerous tasks on behalf of NMTV during her Trinity work day, and her salary at Trinity was never affected in any way. The work that Duff performed on behalf of NMTV was, in practicality, simply a part of her routine Trinity duties. Duff often drafted correspondence relating exclusively to NMTV matters using Trinity stationery and identifying herself in her capacity as Crouch's assistant at Trinity. On numerous occasions, she directed to NMTV employees in Odessa and Portland the same Trinity interoffice memoranda that she directed to Trinity's owned and operated stations. ID at ¶317.

22. According to Trinity, the ultimate question in resolving whether Crouch and/or Trinity exercised de facto control over NMTV is whether Duff acted independently of Crouch or as his agent when she performed her role as a director of NMTV. The Presiding Judge does not agree with Trinity's

proposition. Further, Trinity has failed to show Duff was independent. To support the conclusion that Duff was independent, Trinity cites those rare instances where Duff did not agree with Crouch with respect to a matter concerning NMTV's affairs. However, given Duff's continued role at Trinity, it is virtually impossible to conclude that Duff's activities on behalf of NMTV, including the few times Duff opposed Crouch's desires, were not the result of her assessment of what would be in the best interests of Trinity. Thus, Duff's purported independence as an NMTV board member does little to support a conclusion that Crouch and/or Trinity did not exercise de facto control over NMTV since Duff, during the entirety of her tenure as NMTV board member, also had fiduciary responsibility to Trinity. ID at n. 41.

23. Trinity personnel, consultants and lawyers were routinely utilized, often without cost to NMTV, to prepare, file, and prosecute NMTV's LPTV and translator applications before the Commission. Trinity personnel performed all accounting activities for NMTV. Trinity personnel performed all payroll activities for NMTV. When NMTV contemplated purchasing a full-power television station in Wilmington, Delaware, Crouch dispatched one of Trinity's station managers to inspect the facility. Upon his return, the station manager reported his findings to Trinity's Chief Engineer, Ben Miller, and to Duff. NMTV did not compensate Trinity for the station manager's activities. ID at ¶318.

24. Miller supervised the overall construction of NMTV's full-power television stations in Odessa and Portland. Miller independently authorized numerous purchase orders for equipment and supplies for the Odessa and Portland facilities. He arranged in one instance without charge for the transfer of equipment from a Trinity station to an NMTV station. Miller provided continuing oversight of the operation of the Odessa and Portland stations after they commenced broadcasting. He supervised the engineers at NMTV's Portland and Odessa stations, communicated with them directly, and in one case recommended a bonus for the work that an NMTV engineer had performed. Miller provided all of his services to NMTV without charge. He did not have to bill NMTV. Miller is a salaried Trinity employee who performed many of his NMTV tasks during his Trinity working day. Miller's Trinity salary remained unaffected by the work he performed for NMTV. The work that Ben Miller did for NMTV was simply part of his Trinity job. Crouch's and Duff's claims that Miller was merely a "consultant" to NMTV simply cannot be credited. Miller used a number of different titles depending upon the particular Trinity-related company for which he was working at the moment. Miller's use of those titles, however, constituted nothing more than a contrivance. Miller and a host of other Trinity employees performed work for NMTV as part of their jobs at Trinity because NMTV was considered part of Trinity. ID at ¶319.

25. NMTV's purpose at its inception was to acquire translator stations and LPTV stations that would serve as

additional outlets for Trinity programming. The evidence reveals that every one of NMTV's LPTV and translator stations have always broadcast Trinity programming. During the relatively brief time that NMTV held the license for the Odessa station, nothing but Trinity programming was broadcast. The record evidence further demonstrates that, with the exception of some locally originated programming, the Portland station has also broadcast only Trinity programming. Indeed, it was understood by everyone associated with NMTV that when NMTV applied to the Commission for a construction permit or to acquire an existing station Trinity would be the source of all network programming. No one even considered broadcasting programs provided by any other religious network. NMTV was created by Crouch who founded Trinity. He controlled NMTV's affairs just as much as he controlled those of Trinity. Under the circumstances, it would have been virtually impossible for an NMTV station to broadcast anything other than Trinity programming. NMTV was, in every material respect, a Trinity owned and operated company. ID at ¶320.

26. It is also significant that Trinity held out to the public that NMTV was nothing more than an operating division of Trinity. Thus, in numerous "Praise the Lord" newsletters, Trinity's monthly publication, it was represented in no uncertain terms that Espinoza, then host of the Trinity program, "Felicidad," and a director of NMTV, was "a board member of our Satellite Division." The significance of this representation cannot be understated. Trinity did not have a "Satellite

Division" as such, and the only entity of which Espinoza was a board member was NMTV. In stating that Espinoza was a member of Trinity's Satellite Division, Trinity was referring to NMTV, which Crouch had created for the purpose of acquiring translator stations and rebroadcasting satellite-delivered Trinity programming. NMTV may have been recognized under state law to be a sovereign corporate entity because it had its own articles of incorporation and bylaws, but Crouch plainly regarded NMTV as an operating branch of Trinity. That was Crouch's frame of mind; that is how Trinity characterized NMTV to the public in its newsletters; and that is how, in practice, Crouch and others at Trinity treated NMTV. ID at ¶321.

27. Trinity's communications counsel also treated NMTV as a Trinity subsidiary rather than an independent corporate entity. This is most evident in the manner in which the law firm billed for its services. During the early years of NMTV's existence, when the law firm performed work on behalf of the company, the law firm did not bill NMTV at all for its services. Commencing with NMTV's acquisition of the Odessa station, the law firm included a line item reference for services rendered to NMTV in Trinity's bills. The practice of sending one consolidated invoice to Trinity for services rendered to NMTV, Trinity and other Trinity-named companies continued unabated for some five years. Clearly, the law firm's billing practice is a reflection of how the law firm viewed NMTV's relationship to Trinity. The firm billed and expected payment from only Trinity. It is yet

another indication of the extent to which the two companies were in fact treated as inextricable. ID at ¶322.

28. In sum, the only conclusion that can logically be drawn is that from its inception and throughout its history Trinity and Crouch, aided and abetted by Duff, has exercised de facto control over all facets of NMTV's business. In fact, it is difficult, if not impossible, to distinguish one company from the other. Crouch's invention of NMTV in 1980 provided the vehicle for Trinity's abuse of the Commission's processes. ID at ¶323.

III.

Section 310 of the Act

29. Section 310(d) of the Communications Act provides as follows:

No construction permit or station license, or any rights thereunder, shall be transferred, assigned, or disposed of in any manner, voluntarily or involuntarily, directly or indirectly, or by transfer of control of any corporation holding such permit or license, to any person except upon application to the Commission and upon finding by the Commission that the public interest, convenience, and necessity will be served thereby.

47 U.S.C. §310(d). This statute, reflecting a national communications policy that parties who control the broadcasting airways must be approved by the appropriate federal agency, has been on the books since 1927, substantially in this form since 1934. Communications Act of 1934, Public-No.416-73d Congress, §310(b), drawing upon Section 12 of the Radio Act of 1927 governing the Federal Radio Commission, Sen. Rep., 73d Cong., 2d Sess. (1934) at 24, 48-49.

30. This national communications policy has been

consistently upheld and applied by the courts and the agency throughout the past three-quarters of a century. Shortly after the formation of the Federal Communications Commission, the court addressed the situation where an employer provided funds for a radio station for which his employee filed the FCC application, stating:

It is well known that one of the most powerful and effective methods of control of any business, organization, or institution, and one of the most potent causes of involuntary assignment of its interests, is the control of its finances. By establishing a high enough standard of financial qualification, the Commission can eliminate many of the hazards of such control, direct or indirect in character. It is in the public interest that it should not be impeded in a reasonable exercise of its discretion. The public interest in this respect far outweighs the private interest of any individual applicant.

Heitmeyer v. FCC, 95 F.2d 91, 98 (D.C.Cir. 1937).

31. Following the issuance of the FCC's Report on Chain Broadcasting in 1941, the Supreme Court approved the principle that control of programming must reside in the approved parties licensed to operate individual broadcast stations. National Broadcasting Co. v. United States, 319 U.S. 190, 206-07 (1943).

32. Early on in the adoption of regulations limiting the number of broadcast stations that could be owned and controlled by any party, the Commission adopted the following provision in its regulations:

The word "control" as used herein is not limited to majority stock ownership, but includes actual working control in whatever manner exercised.

Amendment of Sections 3.35, etc., 18 FCC 288, 295-296 (1953).

This provision has remained on the books without change for the

past more than forty years. 47 C.F.R. §73.3555, Note 1.

33. In a landmark decision, the Court of Appeals affirmed a decision by the Commission that unauthorized control rested in a party who provided all of the funds for the station, maintained control of the check book and all payments, structured the board of directors so that he had control, and effectively directed the affairs of the corporation. Lorain Journal Co. v. FCC, 351 F.2d 824 (D.C.Cir. 1965), cert. denied, 383 U.S. 967 (1966).

34. While in the case of non-stock entities the directors (or members) are the parties in whom control vests, the approved parties must in fact control the station operations and de facto control issues are fully applicable. E.g., Southwest Texas Public Broadcasting Council, 85 FCC2d 713, 49 RR2d 156 (1981); The Trustees of the University of Pennsylvania (Radio Station WXPB(FM)), 69 FCC2d 1394, 44 RR2d 747 (1978).

35. Trinity can write repetitive rhetoric and argue until it is blue in the face, but nothing in the actions of the Congress, or the Commission and its staff, has written this law out of existence; and only a mens rea of deliberate abuse of the Commission's processes to serve Trinity's own interests could allow it to act in the manner that it did.

IV.

The motion is an outlaw pleading

36. Without even the ceremony of a motion for leave to do so, Trinity has encumbered the record with an 81-page pleading (plus more than 100 pages of attachments) addressed to the full Commission on the premise that, with the demise of the Review